

1 THE HONORABLE RICHARD A. JONES  
2  
3  
4  
5  
6

7  
8  
9  
10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE WESTERN DISTRICT OF WASHINGTON  
13 AT SEATTLE

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 vs.

17 ROBERT ANDRE FRAZIER,

18 Defendant.

19 No. CR16-00033-RAJ

20 DEFENDANT'S MOTION TO DISMISS  
21 FOR VIOLATION OF BRADY V.  
22 MARYLAND AND GOVERNMENT  
23 MISCONDUCT

24 **ORAL ARGUMENT REQUESTED**

1 I. **RELIEF REQUESTED**

2 Defendant Robert Frazier, by and through his attorneys Lee Covell and Emily M.  
3 Gause, ask this Court to dismiss the indictment for a flagrant violation of Brady v.  
4 Maryland and government misconduct in failing to disclose exculpatory evidence known  
5 to the Government since November 9, 2015 that was willfully suppressed from the  
6 defendant until the day before his suppression hearing (July 22, 2016). Such misconduct  
7 cannot be tolerated.

8 II. **RELEVANT FACTS**

9 Mr. Frazier was arraigned on one count of Felon in Possession of a Firearm on  
10 February 16, 2016. At that time, defense counsel requested discovery pursuant to local  
11 rules. Local Rule 16 requires the Government to provide "evidence favorable to the  
12 defendant and material to the defendant's guilt or punishment to which he is entitled to  
13 pursuant to Brady v. Maryland and United States v. Agurs." The currently assigned  
14

1 Assistant United States Attorney has been assigned to this case from arraignment, for the  
 2 past five months.

3 Prior to today, defense was aware that there was a confidential informant (CI)  
 4 which provided the sole basis to begin investigating Mr. Frazier. All incriminating  
 5 information was solely provided by this confidential informant, as law enforcement merely  
 6 corroborated innocuous facts when they observed Mr. Frazier at a motel for one hour on  
 7 one day prior to their decision to arrest and search Mr. Frazier. Mr. Frazier challenged the  
 8 CI's information and veracity by way of his motion to suppress filed on June 22, 2016.  
 9 That motion is scheduled to be argued on Monday, July 25, 2016 at 9:00 a.m.

10 Defense counsel has requested contemporaneous notes or other documentation of  
 11 CCO Rongen's interactions with the CI because the only summary of his discussions with  
 12 the CI is found in his November 18, 2015 report written *after* Mr. Frazier's arrest and the  
 13 search of a third-party's vehicle. The Government has not provided any materials  
 14 responding to the defense request to date.

15 Today, Friday, July 22, 2016, at 11:25 a.m., defense counsel received an email  
 16 disclosing for the first time that the confidential informant failed a polygraph around the  
 17 same time that he was providing information about Mr. Frazier to CCO Rongen. Exhibit  
 18 A. The Government also informed defense counsel that it was adding two Government  
 19 witnesses for the suppression hearing scheduled for the following day. Ex. A. There is no  
 20 reference to either witness in all of Mr. Frazier's discovery. Mr. Frazier was completely  
 21 unaware that either of these two witnesses were in anyway involved in his case until the  
 22 (business) day before his suppression hearing.

23 Apparently, and conveniently, one of these witnesses will provide hearsay  
 24 information about what the confidential informant told CCO Rongen on November 6,  
 2016. This witness, CCO Leslie O'Connor, is not mentioned once in Mr. Frazier's DOC  
 21 chronos. This witness is also not mentioned in CCO Rongen's report. There is no report  
 22 or document provided to defense authored by CCO O'Connor. Instead, this witness is  
 23 expected to testify based on her personal knowledge and memory from eight months ago  
 24 about a conversation she overheard between CCO Rongen and the confidential informant.

25 Another witness disclosed to defense just one day prior the suppression hearing is  
 26 CCO Patricia Turner, also not mentioned once in all of Mr. Frazier's DOC records. She is

1 expected to testify that the CI failed a polygraph that was taken *during the time* that the CI  
 2 was providing information about Mr. Frazier. Ex. A. Defense does not have any further  
 3 information about the polygraph or any report from CCO Turner.

4 A subsequent email sent today, Friday, July 22, 2016, at 2:45 p.m., one day prior  
 5 to the suppression hearing, further discloses that the CI took the polygraph on *November 6*,  
 6 the same exact day he first provided information about Mr. Frazier to DOC. Ex. B. Further,  
 7 the results of that polygraph were received on *November 9*, and *still* CCO Rongen  
 8 continued to use the CI as his sole basis for developing reasonable cause to find Mr. Frazier  
 9 in violation of his DOC conditions. A subsequent meeting between CCO Rongen and the  
 10 CI on November 15 is the first time that CCO Rongen allegedly learns that Mr. Frazier is  
 11 “staying” at the Star Motel and might be in possession of a firearm.

12 The defense is still waiting for subsequent information regarding these disclosures.  
 13 The Government advises more information is coming.

14 **III. ARGUMENT**

15 As the United States Supreme Court stated in Brady v. Maryland, “the suppression  
 16 by the prosecution of evidence favorable to an accused... violated due process ...  
 17 irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87, 83 S.Ct.  
 18 1194, 1196-1197, 10 L.Ed.2d 215 (1963). The Due Process Clause of the Fourteenth  
 19 Amendment to the United States Constitution requires the Government to reveal any  
 20 information it actually or constructively possesses and which information is favorable to  
 21 the defendant and material to the issue of guilt or punishment, or in any way discredits the  
 22 Government’s case. Brady v. Maryland, 373 U.S. 83, 87 (1963). Favorable evidence under  
 23 Brady includes not only exculpatory evidence but also impeachment evidence. Giglio v.  
 24 United States, 405 U.S. 150, 154–55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Due process  
 requires disclosure of any evidence that provides grounds for the defense to attack the  
 reliability, thoroughness, and good faith of the police investigation, to impeach the  
 credibility of the state’s witnesses, or to bolster the defense case against prosecutorial  
 attacks. Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

25 Brady obligations extend not only to evidence requested by the defense but also to  
 favorable evidence not specifically requested by the defense. United States v. Agurs, 427  
 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Although the Brady rule often is

1 phrased in terms of information “known to the prosecution,” the prosecution’s  
 2 “knowledge” for this purpose clearly extends beyond the personal knowledge of the  
 3 prosecuting attorney representing the Government at trial. Giglio v. United States, 405  
 4 U.S. 150, 154 (1972). The government must not only disclose evidence possessed by  
 5 prosecutors but also evidence possessed by law enforcement as well. Kyles at 437. “The  
 6 individual prosecutor has a duty to learn of any favorable evidence known to others acting  
 7 on the government’s behalf in the case, including the police.” Kyles v. Whitley, 514 U.S.  
 8 419, 437 (1995). “Brady obligations include not only evidence in the prosecutor’s file but  
 9 also include evidence in the possession of the police and others working on the  
 10 Government’s behalf.” Kyles, 514 U.S. at 438, 115 S.Ct. 1555. The Government must  
 11 resolve doubts regarding disclosure in favor of sharing the evidence with the defense.  
 12 Giglio at 154. Further, the Government has a *continuing duty* to disclose discoverable  
 13 information in a criminal prosecution. Id.

14 To establish a Brady violation, a constitutional due process violation warranting  
 15 dismissal, a defendant must demonstrate the existence of each of three elements: “(1) The  
 16 evidence at issue must be favorable to the accused, either because it is exculpatory, or  
 17 because it is impeaching; (2) that evidence must have been suppressed by the Government,  
 18 either willfully or inadvertently; and (3) prejudice must have ensued.” Strickler v. Greene,  
 19 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (emphasis added). As  
 20 courts conduct an analysis under Brady, they consider not only its discrete elements but its  
 21 animating purpose as well: “The animating purpose of Brady is to preserve the fairness of  
 22 criminal trials.” Morris v. Ylst, 447 F.3d 735, 742 (9th Cir. 2006) (citing Brady, 373 U.S.  
 23 at 87, 83 S.Ct. 1194).

24 This indictment should be dismissed because the Government sat on material  
 1 impeaching evidence for eight months without ever disclosing it to defense. This Court  
 2 does not need to find that the Government acted in bad faith to find a Brady violation. Yet,  
 3 it does appear that CCO Rongen, an agent acting on behalf of the Government in Mr.  
 4 Frazier’s case, did act in bad faith when he failed to disclose the material impeaching  
 5 evidence for his star witness who provided the sole basis for beginning an investigation  
 6 into Mr. Frazier. CCO Rongen knew on November 9, 2015 that his CI had failed a  
 7 polygraph. “The personal responsibility [of a prosecutor] cannot be evaded by claiming  
 8

lack of control over the files or procedures of other executive branch agencies." United States v. Jennings, 960 F.2d 1488, 1490-1491 (9th Cir. 1992); *See also United States v. Henthorn*, 931 F.2d 29, 30 (9th Cir. 1991); United States v.. Cadet, 727 F.2d 1453, 1467 (9<sup>th</sup> Cir. 1984).

As the United States Supreme Court stated in Brady v. Maryland, "the suppression by the prosecution of evidence favorable to an accused... violated due process ... irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963). The Government had a duty under Local Rule 16 and Brady v. Maryland to disclose all information that was material to Mr. Frazier's case. By withholding material impeachment evidence, the Government violated its duty to disclose under Brady v. Maryland. Although dismissal is a severe sanction, it will put the Government on future notice that this type of behavior is not to be tolerated in a system that must recognize the due process rights of all accused persons who come before it. Mr. Frazier's rights have been substantially prejudiced in that he must now choose between his right to a fair trial with effective assistance of counsel or his right to a speedy trial. The Government became aware that the veracity of the Confidential Informant (CI) was being challenged by defense on June 29, 2016 when defense filed a motion to suppress in this case. Now, a month later, we have a late disclosure the day before Mr. Frazier's suppression hearing that is directly material to the suppression issues and impeaches the CI. Waiting until the very last minute to dump material information on the defense is government misconduct.

#### IV. CONCLUSION

*"There is an epidemic of Brady violations abroad in the land, only judges can put a stop to it."*

United States v. Olsen, 737 F.3d 625 (9th Cir. 2013) (Chief Judge Kozinski, dissenting).

For the reasons stated above, Mr. Frazier urges this Court to dismiss the indictment for flagrant violation of Brady v. Maryland, finding prejudice to Mr. Frazier's right to effective assistance of counsel or forcing him to waive his right to speedy trial, and government misconduct warranting dismissal.

1 DATED this 22nd day of July, 2016.

2 Respectfully submitted,

3 s/ Emily M. Gause

4 EMILY M. GAUSE, WSBA #44446  
5 Attorney for Robert Andre Frazier  
6 1001 Fourth Avenue, Suite 4400  
7 Seattle, WA 98154  
8 206-660-8775 fax: 206-389-1708  
9 Email: emily@emilygauselaw.com

10 s/ Lee A. Covell

11 LEE A. COVELL, WSBA # 952  
12 Attorney for Robert Andre Frazier  
13 119 First Avenue South, Suite 500  
14 Seattle, WA 98104  
15 206-682-6644 fax: 206-682-3002  
16 Email: leecovell@aol.com

17 CERTIFICATE OF SERVICE

18 I hereby certify that on this day, I electronically filed Defendant Robert Andre  
19 Frazier's Motion to Dismiss for Violation of Brady v. Maryland and Government  
20 Misconduct with the clerk of the court using the CM/ECF system which will send  
21 notification of such filing to all parties of record.

22 Dated this 22nd day of July, 2016.

23 s/ Emily M. Gause

24 Emily M. Gause, WSBA #44446  
1001 Fourth Avenue, Suite 4400  
Seattle, WA 98154  
206-660-8775 fax: 206-389-1708  
Email: emily@emilygauselaw.com